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In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
PETITIONER

v.

THE DOW CHEMICAL COMPANY AND
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner and respondent Dow Chemical Company were parties to a collective-bargaining contract which permitted petitioner to strike only after exhaustion of a five-step contractual grievance procedure and completion of arbitration or refusal by one of the parties to arbitrate (Pet. App. 146a).[1] In May 1971, Dow decided, for economic

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[1]The clause provides in relevant part (Pet. App. 5a, 95a n.4):

> The Union will not cause or engage in or authorize its members to engage in any strike against the Company, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with production of the Company, unless and until all of the Bargaining and Grievance Procedures outlined in this agreement have been exhausted.

reasons, to change the work schedule of 16 employees in the latex department of its Allyn's Point plant at Ledyard, Connecticut. Under the proposed change, instead of working seven consecutive days and then having two days off, Dow's employees would work five consecutive days and then have 2 days off. This change would have entailed a substantial loss of earnings for the employees involved (Pet. App. 131a-133a).

Dow refused to bargain about the decision to change the work schedule, arguing that the change was authorized by the management-rights clause in the contract (Pet. App. 133a-135a). Petitioner filed a grievance, protesting the refusal to bargain about the schedule change. The grievance was denied at each of the first four steps of the grievance procedure (Pet. App. 134a-135a). Dow refused to postpone implementation of the schedule change pending arbitration or to agree to immediate arbitration (Pet. App. 37a-38a). Petitioner failed to comply with the requirements of Step 5 of the grievance procedures or to make a written request for arbitration (Pet. App. 147a-148a). On June 7, 1971, the day the schedule change was to go into effect, all the employees in the plant went on strike (Pet. App. 135a-136a).

On August 9, 1971, Dow notified petitioner that because of the strike in breach of contract, it was cancelling the contract (Pet. App. 139a). On August 12, Dow notified the strikers that requests for reinstatement must be made by 4:00 p.m. on August 17 and that those who failed to request reinstatement by the deadline would no longer be employed by Dow (Pet. App. 139a-140a).

Ninety-five employees were fired and a majority of the remaining employees signed a petition stating that they did not want petitioner as their bargaining representative. Dow then notified petitioner that it had reason to believe that petitioner no longer represented a majority of the employees at the Allyn's Point plant and, consequently, would no

longer recognize petitioner as the bargaining agent at this plant (Pet. App. 141a).

2. In its decision (Pet. App. 121a-155a), the Board found that the contract did not authorize the unilateral change in the work schedule of the latex department and therefore Dow violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with petitioner (Pet. App. 143a-145a). It concluded, however, that this was not a sufficiently "serious" unfair labor practice to justify petitioner's breach of the no-strike clause (Pet. App. 149a). See *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. 802 (1961). Since petitioner had violated the contract, the Board held that its strike was not an activity protected by the Act.

The Board then considered whether Dow's subsequent conduct nonetheless converted petitioner's illegal strike into a valid unfair labor practice strike (Pet. App. 149a). The Board rejected the General Counsel's contention that the cancellation of the contract by Dow was an excessive response to the strike and therefore a violation of Section 8(a)(5) and (1). Instead, the Board found that cancellation of the contract was a justifiable response to petitioner's prior, material breach of the contract (Pet. App. 151a). See *Marathon Electric Mfg. Corp.*, 106 N.L.R.B. 1171 (1953), aff'd *sub nom. United Electrical Workers* v. *NLRB*, 223 F. 2d 338 (D.C. Cir. 1955), cert. denied, 350 U.S. 981 (1956).

The Board then considered whether the discharge of the strikers was a violation of Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). The Board found that since the strike was unprotected activity at all times prior to the dismissals, Dow's actions were permissible (Pet. App. 152a-153a).

Finally, the Board found that the anti-union petition signed by the remaining employees created a reasonable

doubt about petitioner's majority status and therefore Dow did not violate Section 8(a)(5) and (1) by withdrawing recognition from petitioner (Pet. App. 153a-154a). Accordingly, the Board dismissed the complaint in its entirety (Pet. App. 122a).[2]

3. The court of appeals in its initial review of this case upheld the Board's findings that Dow's unilateral change in the work schedule was an unfair labor practice and that petitioner had failed to comply with the contractual prerequisites for instituting a strike (Pet. App. 101a). The court, however, remanded all other aspects of the proceedings.

Without deciding whether the Board's reliance on "serious" unfair labor practices as a predicate for finding the strike to be protected activity was a permissible interpretation of the no-strike clause (Pet. App. 115a-117a) or whether one party's breach of the contract generally should allow the other party to rescind the agreement (Pet. App. 117a-119a), the Court ordered the Board to reconsider the case "[i]n light of recent trends in labor policy" designed to eliminate what the court of appeals characterized as the "tooth and claw of industrial warfare" approach taken by Dow and approved by the Board (Pet. App. 120a).[3]

4. On remand, a majority of the Board held that it would retain the rule announced in *Arlan's Department Store, supra,* that only "serious" unfair labor practices justify a strike when there is a no-strike clause in the collective

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[2]With regard to Dow's violation of Section 8(a)(5) and (1) by its proposed unilateral change in the production schedule, the Board concluded that no remedial order was required because the change never had been implemented and petitioner no longer represented the employees in the latex department (Pet. App. 154a-155a).

[3]This Court denied Dow's petition for a writ of certiorari from that decision. *Dow Chemical Co.* v. *United Steelworkers,* 429 U.S. 834 (1976).

bargaining agreement (Pet. App. 31a-32a, 51a-59a, 79a-83a).[4] A majority also found that Dow's unilateral alteration in the work schedule was a "serious" unfair labor practice and thus petitioner had engaged in a protected unfair labor practice strike (Pet. App. 33a). The majority therefore concluded that Dow's actions in rescinding the contract, discharging the striking employees and withdrawing recognition from petitioner all were unfair labor practices (Pet. App. 36a-37a). The Board ordered Dow to bargain with petitioner and to offer all the strikers reinstatement with back pay (Pet. App. 43a-44a).

5. On review, the court of appeals denied enforcement of the Board's second order. The court again declined to pass expressly on the validity of the Board's use of "serious" unfair labor practices as the basis for deciding whether a strike is protected activity, but did hold that not all unfair labor practices justify a union's disregard of a no-strike provision in its contract (Pet. App. 16a-19a). The court held that this strike over conflicting interpretations of the collective bargaining agreement, which could have been resolved through the grievance and arbitration proceedings rejected by the union, violated the no-strike clause of the contract (Pet. App. 18a-19a). The court also declined to remand to the Board to allow it to consider whether petitioner's breach of contract justified Dow's rescission of the contract (Pet. App. 21a-22a). It held that the strike placed Dow in the position of either hiring replacements or shutting down, and that, because rescission of the contract required in

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[4]Chairman Fanning and Member Jenkins voted to overrule *Arlan's Department Store* on the ground that it was inconsistent with this Court's decision in *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956), and that it encourages employers to commit "non-serious" unfair labor practices thereby fostering labor unrest (Pet. App. 32a n.8). This was the same position then-Member Fanning asserted in his dissenting opinion in *Arlan's Department Store, supra*, 133 N.L.R.B. at 815, which was a decision by only a panel of three Board members.

order to hire replacements, this action was justified in this case (Pet. App. 22a).[5] Since petitioner had lost its majority status, withdrawal of recognition was also justified.

6. Petitioner first asks this Court to review the court of appeals' decision that its strike in response to Dow's unfair labor practice violated the no-strike clause in its contract. It contends that the decision is inconsistent with this Court's decision in *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956), and that it conflicts with the Tenth Circuit's decision in *NLRB* v. *Northeast Oklahoma City Mfg. Co.*, 631 F. 2d 669 (1980) (Pet. 12-14).

The scope of the issue presented by petitioner is not clear. It acknowledges that the issue of whether the Board's decision in *Arlan's Department Store* is consistent with this Court's decision in *Mastro Plastics* is not directly raised in its petition (Pet. 13 n.11). It concedes, however, that the validity of the Board's general rule may be called into question by any decision of this Court in this case (*ibid.*). To the extent that petitioner seeks in this petition to obtain review of the Board's rule in *Arlan's Department Store*, we oppose review of this case. The Board's decision that the holding of *Mastro Plastics* should apply only in cases of "serious" unfair labor practices is consistent with the analysis of this Court in *Mastro Plastics* and best effectuates the national labor policy.

This Court in *Mastro Plastics* was presented with "a flagrant example of interference by the employers with the expressly protected right of their employees to select their own bargaining representative." 350 U.S. at 278. Placing *Mastro Plastics* in its factual setting, the Board has taken

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[5]Judge Weis dissented. He agreed with the majority that the strike was in violation of the contract, but would have remanded to the Board to allow it to decide whether rescission of the contract was an appropriate response in this case (Pet. App. 23a-24a).

the view that this Court did not declare all unfair labor practice strikes permissible under a general no-strike provision, but instead merely "rejected the extreme application which the employers sought to give to the general no-strike clause in their collective bargaining contract * * *." *Arlan's Department Store, supra,* 133 N.L.R.B. at 805. Thus, the Board has held that only "serious" unfair labor practices immunize a strike against a no-strike clause. *Id.* at 807; Pet. App. 31a-32a. See Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 Mich. L. Rev. 1, 17-18 (1958).

The reason for limiting the scope of *Mastro Plastics* in this fashion is to encourage unions to resort to the arbitration process instead of striking over every insignificant contract breach committed by the employer. *Arlan's Department Store, supra,* 133 N.L.R.B. at 808; Pet. App. 32a. This policy judgment, impliedly upheld by the court of appeals, is one uniquely within the expertise of the Board and does not warrant review by this Court.

Petitioner, however, may be arguing only that the Third Circuit erred in not holding that Dow's unilateral change in the work schedule was sufficiently serious to justify its strike. This was the position the Board took on remand (Pet. App. 33a) and the Board believes that the court of appeals erred in overturning this decision. The Board, however, did not petition the Court for a writ of certiorari on this issue because it concluded that its dispute with the court of appeals is basically a factual one. In the Board's view Dow was primarily responsible for the labor dispute because of its refusal to delay implementation of the change in work schedule and its failure to press for an arbitral solution (*ibid.*). The court of appeals concluded that petitioner was primarily at fault for failing to pursue the grievance and arbitration procedures available to resolve a straightforward issue of contract interpretation (Pet. App. 18a-19a).

The Board believes that the court of appeals exceeded its permissible scope of review by substituting its judgment for that of the Board, and, if the petition for a writ of certiorari is granted with respect to this issue, the Board will defend its decision. Nonetheless, this issue may not be of general importance.[6]

7. Petitioner also seeks review (Pet. 15-17) of the court of appeals' decision that Dow could rescind the contract in response to petitioner's breach of the no-strike clause. It argues that the court of appeals' reliance on general contract principles in *Marathon Electric Mfg. Corp., supra,* is inconsistent with decisions of this Court favoring more orderly methods of dispute resolution than repudiation of the collective bargaining agreement. See *United Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247 (1964); *Drake Bakeries Inc.* v. *American Bakery & Confectionery Workers,* 370 U.S. 254 (1962).

The Board did not reach the issue of the continuing validity of the *Marathon Electric Mfg.* decision. Nonetheless, the Board asked the court of appeals to remand this case again to permit it to reevaluate whether rescission of the contract was an appropriate response to the breach of the no-strike clause in this case. The court of appeals erred

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[6]The Board does not believe that there is any clear conflict between the decision in the instant case and the Tenth Circuit's decision in *NLRB* v. *Northeast Oklahoma City Mfg. Co., supra.* The Tenth Circuit was more properly deferential to the Board with regard to its finding on the seriousness of the unfair labor practice involved in that case. Nonetheless, the conduct of the employer in *Northeast Oklahoma City Mfg. Co.*, involving repeated failures to pay bonuses which were a substantial portion of the employees' monthly wage, was a "material breach" of the collective bargaining agreement. 631 F. 2d at 677. The Board cannot state with confidence that the Third Circuit would have decided that case differently than did the Tenth Circuit.

in not remanding as proposed by the Board and by Judge Weis in his dissenting opinion (see page 6 note 5, *supra*).

The Board, however, did not petition for a writ of certiorari on this issue because the decision seemed to be based on factors peculiar to this case. The Board already had declined to pass on this very issue when it had the opportunity after the first remand, the case is unusual in that no injunction against the strike could be obtained due to the lack of a mandatory arbitration clause, and the case already is ten years old.

Nonetheless, if the petition for a writ of certiorari is granted, the Board will take the position that the case should be remanded to it for a determination of the continued validity of the *Marathon* doctrine and its applicability to this case. As it stands now, this question is not ripe for review by the Court.[7] It would be more appropriate for the Court to wait until the Board has had an opportunity to reconsider the doctrine in order to have the benefit of the Board's considered judgment as to what remedy for breach of a no-strike clause best effectuates the national labor policy. See *South Prairie Construction Co.* v. *Local No. 627, International Union of Operating Engineers*, 425 U.S. 800, 805-806 (1976).

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[7]Petitioner argues that the issue requires immediate resolution because it conflicts with the Fifth Circuit's decision in *NLRB* v. *State Electric Service, Inc.*, 477 F. 2d 749 (1973). Although the Fifth Circuit's opinion contains language broadly rejecting the *Marathon Electric* case, it is only an alternative holding and thus does not present a true conflict between the circuits. Moreover, the Fifth Circuit merely rejected the rule that a union's breach of the no-strike clause "automatically" justifies rescission. 477 F. 2d at 751. The Third Circuit's decision is not based on an automatic rescission rule, but rather examines the specific situation involved in this case and concludes that on this record rescission of the contract by the employer was justified (Pet. App. 21a-22a). The court's general expression of approval for the *Marathon Electric* decision does not convert this essentially narrow factual determination into a broader holding requiring review by this Court.

CONCLUSION

Although both questions presented by petitioner involve errors committed by the court of appeals, they do not necessarily raise issues warranting review by this Court.

Respectfully submitted.

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